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 IMTIAZ KHAN, *et al.*

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

IMTIAZ KHAN, an individual, TIM  
 MORRIS, an individual, RICK SEISINGER,  
 an individual, and NEELESH SHAH, an  
 individual,

Plaintiffs,

v.

K2 PURE SOLUTIONS, L.P., a Delaware  
 limited partnership, K2 PURE SOLUTIONS  
 NOCAL, L.P., a Delaware limited partnership,  
 K2 PURE SOLUTIONS PITTSBURG, L.P., a  
 Delaware limited partnership, and DOES 1  
 through 10, inclusive,

Defendants.

K2 PURE SOLUTIONS, L.P., a Delaware  
 limited partnership,

Counter-Claimant,

v.

IMTIAZ KHAN, an individual, TIM  
 MORRIS, an individual, RICK SEISINGER,  
 an individual, and NEELESH SHAH, an  
 individual

Counter-Defendants.

Case No.: 3:12-cv-05526-WHO

**PLAINTIFFS' SUPPLEMENTAL BRIEF  
 IN SUPPORT OF THEIR MOTION FOR  
 PARTIAL SUMMARY JUDGMENT  
 PURSUANT TO THIS COURT'S  
 SEPTEMBER 3, 2013 ORDER**

Hearing Date: TBD  
 Time: TBD  
 Judge: Hon. William H. Orrick  
 Courtroom: 2  
 Floor: 17  
 Trial Date: June 9, 2014

Complaint Filed: October 15, 2012

Case Removed: October 26, 2012

1 **I. INTRODUCTION**

2 Plaintiffs Imtiaz Khan, Rick Seisinger and Neelesh Shah (collectively, “Plaintiffs”) hereby  
 3 submit this supplemental brief pursuant to the Court’s Order issued on September 3, 2013  
 4 (“September 3<sup>rd</sup> Order”). As requested in the September 3<sup>rd</sup> Order, the sole issue addressed herein  
 5 is whether the attorney’s fees incurred by Plaintiffs in defending K2’s efforts to enforce its  
 6 admittedly illegal non-compete agreements in the Nevada and Ohio actions constitute economic  
 7 harm sufficient to confer standing under California Business and Professions Code Section 17200  
 8 *et seq.*, California’s Unfair Competition Law (“UCL”). Both California and federal case law  
 9 answer this question in the affirmative. Given this controlling authority and the fact that K2’s  
 10 non-compete provisions indisputably violate the UCL, no triable issues of fact exist and summary  
 11 judgment should be granted in favor of Plaintiffs on their Ninth Cause of Action.<sup>1</sup>

12 **II. ARGUMENT**

13 To establish standing under the UCL, as modified by Proposition 64, a plaintiff must  
 14 demonstrate economic injury resulting from a defendant’s unfair or unlawful business practices.  
 15 *Kwikset Corp. v. Sup. Ct.*, 51 Cal.4th 310, 323 (2011); Cal. Bus. & Prof. Code § 17204 (“Actions  
 16 for relief pursuant to this chapter shall be prosecuted by” . . . “a person who has suffered injury in  
 17 fact and has lost money or property as a result of the unfair competition.”). Proposition 64 was  
 18 passed by California voters to discourage “shakedown lawsuits” filed by plaintiffs who have not  
 19 suffered harm from would-be defendants. *Id.* at 317. Notwithstanding the UCL’s narrowed  
 20 standing provisions, California courts have warned that the “injury in fact” requirement is not  
 21 exacting or insurmountable. “Injury-in-fact is not Mount Everest.” *Troyk v. Farmers Group, Inc.*,  
 22 171 Cal.App.4th 1305, 1347 (2009) (quoting *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432

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23 <sup>1</sup> Plaintiffs respectfully request that the Court’s ruling on this standing issue also apply to  
 24 Plaintiff Timothy Morris, as the pertinent facts and issues presented herein are identical for Mr.  
 25 Morris. The evidence of economic harm submitted by Plaintiffs attached to the Supplemental  
 26 Declaration of Troy A. Valdez, Esq. is the same for Mr. Morris. Further, in the September 3<sup>rd</sup>  
 27 Order, the Court stated: “[i]t will be speedier, less expensive, and as just to allow the parties to  
 brief [the standing] issue than to allow a second round of motions for summary judgment [] or to  
 require the parties to go to trial on this issue.” Extending the application of the Court’s ruling on  
 UCL standing to all plaintiffs, including Mr. Morris, will also serve the Court’s stated goals.

1 F.3d 286, 294 (3d. Cir. 2005). Rather, “the contours of the injury-in-fact requirement ... are very  
 2 generous, requiring only that claimant allege [ ] some specific, identifiable trifle of injury.” *Hale*  
 3 *v. Sharp Healthcare*, 183 Cal.App.4th 1373, 1383 (2010). Under California law, legal defense  
 4 fees incurred because of an unfair business practice constitute economic harm sufficient to confer  
 5 standing under the UCL.

6 As this Court noted in the September 3<sup>rd</sup> Order, there are “innumerable ways” in which  
 7 economic injury from unfair competition may be shown to satisfy the UCL’s standing  
 8 requirement, including being “required to enter into a transaction, costing money or property, that  
 9 would otherwise have been unnecessary.” Court Docket # 63; *Kwikset, supra*, 51 Cal.4th at 323.  
 10 “An injury to a tangible property interest, such as money, generally satisfies the ‘injury in fact’  
 11 element for standing.” *Tourgeman v. Collins Financial Srvcs., Inc.*, 2009 WL 6527758 \* 7 (S.D.  
 12 Cal. Nov. 23, 2009). Both California state and federal courts have consistently ruled that  
 13 monetary expenditures caused by a defendant’s unfair competition confer to the victims standing  
 14 under the UCL. “[O]ut of pocket expenses or money spent [is] a financial harm that constitute[s]  
 15 an] ‘injury in fact’” for purposes of standing under the UCL. *Troyk, supra*, 171 Cal.App.4th at  
 16 1347-48; *Hall v. Time, Inc.* 158 Cal.App.4th 847, 854 (2008) (a plaintiff required to expend  
 17 money due to defendant’s unfair competition has standing under Section 17200); *Kaiser v. BMW*  
 18 *of North America*, 2013 WL 100218 (N.D. Cal. Jan. 7, 2013) (plaintiff establishes UCL standing  
 19 by showing he made monetary expenditures that would have been unnecessary but for  
 20 defendant’s anti-competitive conduct).

21 Here, Plaintiffs unquestionably suffered economic injury defending themselves from K2’s  
 22 aggressive attempts to enforce its admittedly unlawful non-competes in the Nevada and Ohio  
 23 actions. Court Docket No. 52 (K2’s Response to Motion for Partial Summary Judgment, p. 2,  
 24 lines 27-28). Specifically, Plaintiffs incurred legal fees and costs totaling over \$61,000.00 in the  
 25 Nevada action and over \$72,000.00 in the Ohio action. Supplemental Declaration of Troy A.  
 26 Valdez (“Valdez Supp. Decl.”) ¶ 5 (filed herewith). Further, due to K2’s transparent attempt to  
 27 avoid unfavorable California law by filing lawsuits outside of California (despite the fact that

1 Plaintiffs worked for K2 in California and despite K2's subsequent admission that California law  
 2 applies to this dispute), Plaintiffs were forced to seek relief from Defendants' litigation tactics by  
 3 filing a request for declaratory relief in California on October 15, 2012.<sup>2</sup> Court Docket # 1. In  
 4 short, all of Plaintiffs' legal fees were incurred only because K2 affirmatively attempted to  
 5 enforce agreements that it admits violate California law. These monetary expenditures caused by  
 6 K2's unfair business practices indisputably constitute an injury in fact and confer Plaintiffs with  
 7 standing under the UCL.

8 Numerous cases dictate that legal fees and costs incurred as a result of unfair business  
 9 practices satisfy the standing requirements of the UCL. The cases *Koller v. West Bay*  
 10 *Acquisitions, LLC*, 2012 WL 2862440 (N.D. Cal. July 11, 2012), *Janti v. Encore Capital Group,*  
 11 *Inc.*, 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010) and *Tourgeman v. Collins Financial Services,*  
 12 *Inc.*, 2009 WL 6527758 (S.D. Cal. Nov. 23, 2009) are dispositive on the present standing issue,  
 13 and compel this Court's granting of summary judgment in favor of Plaintiffs on their Ninth Cause  
 14 of Action.

15 In *Koller v. West Bay Acquisitions, LLC*, 2012 WL 2862440 (N.D. Cal. July 11, 2012), the  
 16 defendant, a debt collection agency, attacked the plaintiff's UCL claim on standing grounds. *Id.*  
 17 at \*\*1-2. The plaintiff claimed he suffered economic injury as a result of the defendant's unfair  
 18 practices based on legal costs incurred prior to any litigation, including hiring counsel to respond  
 19 to the defendant's letters and to render defensive advice. *Id.* at \*8. The Northern District Court  
 20 agreed. The *Koller* court emphasized "costs expended to defend against litigation are very  
 21 different than costs expended to file suit" and further held:

22 "Plaintiff's costs, expended to discover whether Plaintiff was required to pay the  
 23 fees and defend himself against Defendants' collection efforts constitute economic  
 24 injury as defined in *Kwikset*, as an expense that occurred that would have otherwise  
 been unnecessary."

25 <sup>2</sup> Plaintiffs have incurred legal fees and costs in excess of \$185,000.00 for the California action  
 26 alone through July 2013. It should be noted that unlike the plaintiff in *Cordon v. Wachovia*  
 27 *Mortgage, a Div. of Wells Fargo Bank, N.A.*, 776 F.Supp.2d 1029 (N.D. Cal. 2011), Plaintiffs did  
 not affirmatively initiate litigation, but were forced to bring this action because of K2's threats of  
 litigation outside of California. Valdez Supp. Decl. ¶ 5.

1 Here, like in *Koller*, Plaintiffs were forced to hire legal counsel to discover whether the illegal  
 2 non-compete provisions precluded them from working for another California employer and to  
 3 defend against K2's efforts to enforce the illegal non-compete provisions in Nevada and Ohio. At  
 4 the same time, K2's blatant forum-shopping efforts forced Plaintiffs to take on offensive litigation  
 5 and bring K2's unfair competition before a California tribunal, where both the Nevada and Ohio  
 6 courts agreed it belonged, to ensure that K2 was not successful in foreclosing their lawful  
 7 employment through a non-California jurisdiction. These efforts and the expenses associated  
 8 therewith would have been unnecessary but for K2 seeking to enforce the admittedly illegal non-  
 9 competes. Accordingly, just as in *Koller*, Plaintiffs' legal expenses constitute sufficient injury in  
 10 fact to provide Plaintiffs with standing to sue under the UCL. Cal. Bus. & Prof. Code § 17204.

11 *Janti v. Encore Capital Group, Inc.*, 2010 WL 3058260 (S.D. Cal. Aug. 3, 2010) also  
 12 compels a finding that Plaintiffs have standing under Section 17204. In *Janti*, the defendants sent  
 13 the plaintiff a "Pre-Legal Notification" debt collection letter and subsequently filed a lawsuit  
 14 against the plaintiff in state court. The plaintiff answered the state court complaint and separately  
 15 sued the defendants in federal court for various claims arising out of the defendants' debt  
 16 collection efforts, including a claim for unlawful and unfair business practices in violation of  
 17 Section 17200. *Id.* at \*1. The Court summarily rejected the defendants' argument that the  
 18 plaintiff lacked standing to bring the UCL claim, holding that the "injury in fact" requirement is  
 19 satisfied where the alleged unfair or unlawful conduct caused the plaintiff to incur legal expenses.  
 20 *Id.* at \*\*7, 8. In fact, the *Janti* court found the \$50 filing fee the plaintiff paid to answer the  
 21 defendants' state court complaint sufficient to constitute injury in fact and establish standing under  
 22 the UCL. *Id.* This Court should make a similar ruling here where Plaintiffs were forced to incur  
 23 substantially more than \$50 in legal fees to defend against K2's efforts to enforce an illegal non-  
 24 compete. Valdez Suppl. Decl. ¶ 5.

25 The case *Tourgeman v. Collins Financial Services, Inc.*, WL 6527758 (S.D. Cal. Nov. 23,  
 26 2009) at \*\*7, 8 similarly supports Plaintiffs' standing in this action. The *Tourgeman* defendant  
 27 argued that the plaintiff lacked standing to assert a UCL claim. The plaintiff claimed that the

defendant's conduct caused him to incur legal expenses to defend the defendant's state court action. The *Tourgeman* court found that the plaintiff's legal defense fees were "out-of-pocket expenses" that constituted an injury in fact. *Id.* at \*7. This reasoning equally applies here. Plaintiffs' legal defense fees in excess of \$134,000.00 in the Nevada and Ohio actions (and \$185,000.00 in the California action) are also out-of-pocket expenses caused by K2's enforcement tactics and, thus, satisfy the UCL's standing requirements. Valdez Supp. Decl. ¶ 5. It also is critical to highlight that Plaintiffs' UCL claim is not the type of "shakedown" suit Proposition 64 aims to squelch. Rather, K2's admitted conduct – namely, its use of and attempts to enforce illegal non-competes – is precisely the type of unfair competition Section 17200 seeks to curb. *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564, 575 (2009); *Arkley v. Aon Risk Services Cos., Inc.*, 2012 WL 2674980 \*5 (C.D. Cal. June 13, 2012). Therefore, given that Plaintiffs indisputably have standing under the UCL and Defendants have admittedly engaged in unfair competition to cause Plaintiffs' economic injury, the Court must grant Plaintiffs summary judgment with respect to their Ninth Cause of Action.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs Imtiaz Shah, Rick Seisinger and Neelesh Shah ("Plaintiffs") respectfully request that the Court hold that Plaintiffs, including Timothy Morris, have standing under California Business and Professions Code Section 17200 *et seq.*, grant summary judgment on their Ninth Cause of Action and, further, specify in the Court's order that its rulings are a final determination of the issues and not subject to future proceedings in this action.

Dated: September 17, 2013

VALDEZ TODD & DOYLE LLP

/s/ Troy A. Valdez  
TROY A. VALDEZ

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IMTIAZ KHAN, *et al.*